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This Is Not Your Grandfather's Labor Union — Or Is It? Exercising Section 7 Rights in the Cyberspace Age

INTRODUCTION

There is a stretch of property along the banks of the Monongahela River in Pittsburgh, Pennsylvania, that is home to about a half dozen new buildings. Housed inside these gleaming steel and glass structures are businesses working on the cutting edge of the latest technology. A quarter-century ago, however – and for the 141 years before that – this 48-acre tract comprised a significant part of the Jones & Laughlin Steel Corporation's ("J & L") Pittsburgh Works.¹ Where once blast furnaces lit up the night sky and red-hot ribbons of steel were rolled into the building blocks of this nation, rollerbladers and joggers now wend their way past the well-manicured campus of shiny buildings.

The rebirth of an urban brownfield is noteworthy enough, but the site is particularly remarkable for the pages of American labor history. For it was J & L that challenged the Wagner Act,² the foremost piece of federal labor legislation in the United States.³ The heart of the Wagner Act⁴ ("Act"), and the epicenter of controversy in *NLRB v. Jones & Laughlin*, is Section 7. This brief provision, a scant forty words, granted workers the right to organize themselves into unions of their own choice.⁵

1. John R. Lane, *Introduction* to MARK PERROTT, ELIZA: REMEMBERING A PITTSBURGH STEEL MILL 13 (Howell Press 1989).

2. The suit culminated in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). While the steel maker's headquarters were located in Pittsburgh, the events giving rise to the U.S. Supreme Court case took place at its sister plant, the Aliquippa Works, located 15 miles northwest of Pittsburgh.

3. The Wagner Act, also known as the National Labor Relations Act, 29 U.S.C. §§ 129-169 (1998) became effective in 1935. The Act is popularly known as the Wagner Act in honor of its sponsor, U.S. Sen. Robert Wagner, a New York Republican. BENJAMIN TAYLOR & FRED WITNEY, U.S. LABOR RELATIONS LAW 165 (1992). Significant amendments to the Act were made in 1947 and 1959. The substance of those amendments is beyond the reach of this Comment.

4. See ARCHIBALD COX ET AL., LABOR LAW: CASES AND MATERIALS 77-78 (12th ed. 1996).

5. Prior to the 1947 amendments, Section 7 read as follows: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid." 29 U.S.C. § 157 (1998). The

Steelworkers at J & L in the late 1930s – certainly emboldened by the federal government's sweeping grant of protection over unionization – engaged in this type of organizational activity. The steel maker discharged them from their jobs as a consequence.⁶ The United States Supreme Court decision righted this apparent wrong by affirming not only the constitutional validity of the Wagner Act, but also the decision of the newly-formed National Labor Relations Board ("NLRB" or "Board") which found that J & L had violated the rights guaranteed the workers by the Act.⁷

Nearly seven decades have gone by since the *Jones & Laughlin* decision. The manufacturer's predecessor shuttered the Pittsburgh Works in the mid-1980s, making the way for the Pittsburgh Technology Center and its cluster of high-tech offices. Pittsburgh and other so-called Rust Belt towns with traditionally high concentrations of unionized workers have played witness to this dramatic shift in the economic landscape.

The National Labor Relations Act nonetheless maintains its vitality despite the decline in the industries that gave rise to the Act's adoption. Where union organization drives once occurred among uneducated men laboring in the soot and toil of factories and mills, those efforts now take place in high-tech laboratories staffed by men and women possessing advanced technical degrees. However, as the cliché goes, the more things change the more they remain the same. Workers in high-tech industries face problems familiar to their heavy industry counterparts of yesteryear, namely how to bring the message of self-organization to their coworkers.

The beauty of the Act lies in its simple language and clear purpose. Employees are given the statutory right to self-organize and bargain collectively. The Board and the U.S. Supreme Court have held that this right "necessarily encompass[es] the right to effectively communicate with one another concerning

1947 amendments granted employees the right to *refrain* from engaging in such activities, but only to the extent that they are not required as a condition of employment. *Id.*

6. See *Jones & Laughlin*, 301 U.S. at 28.

7. See *id.* at 34. The Court stated:

[The right of employees to organize] is a fundamental right. Employees have as clear a right to organize and select their representatives for lawful purposes as the respondent has to organize its business and select its own officers and agents. Discrimination and coercion to prevent the free exercise of the right of employees to self-organization and representation is a proper subject for condemnation by competent legislative authority.

Id. at 33.

self-organization at the jobsite.”⁸ This right continues to have validity and purpose in the Internet Age despite the fact that the Act was a product of an economic climate that has, in many quarters, disappeared.

The latest proving ground for employee communication in the work place is company-owned electronic mail (“e-mail”) systems.⁹ The Board and the Court gave life to this statutory right through a series of key decisions concerning employee communication at the job site. As the characteristics of work and the work place changed in ways never envisioned by the framers of the Act, the models by which the Board and courts formulated the law on employee communication arguably outgrew their Industrial heritage.

This is readily apparent from the agitation of practitioners and commentators in the wake of a 1998 directive¹⁰ by the Board’s investigation branch. In the directive, the Board’s General Counsel (“GC”) applied traditional analytical models to contemporary workplace phenomena. Specifically, the presence of electronic mail (“e-mail”) in contemporary workplace settings has altered the way employees communicate with one another.

The directive prompted a heated response from commentators and practitioners operating from the management side of the labor relations equation. This is not surprising. The casebooks are full of employer resistance to situations related to employee communication for the purpose of self-organization. Yet the Board and the Court have managed through the years to harmonize employees’ statutory rights with employer property rights. This type of careful balancing of important interests continues today with the

8. See *Beth Israel Hosp. v. N.L.R.B.*, 437 U.S. 483, 491 (1978).

9. One source pegs employee usage of e-mail in the United States at 1 billion messages per day. See Terrence Lewis, *Monitoring Employee e-mail: Avoid Stalking and Illegal Internet Conduct*, PITTSBURGH BUS. TIMES & J., May 19, 2000, at 40. Congress defined e-mail in 1986. This definition shows its age, but nonetheless conveys in general terms how e-mail operates. The definition is as follows:

[E-mail] is a form of communication by which private correspondence is transmitted over public and private telephone lines. In its most common form, messages are typed into a computer terminal, and then transmitted over telephone lines to a recipient computer operated by an electronic mail company. If the intended addressee subscribes to the service, the message is stored by the company’s computer “mail box” until the subscriber calls the company to retrieve its mail, which is then routed over the telephone system to the recipient’s computer Electronic mail systems may be available for public use or may be proprietary, such as systems operated by private companies for internal correspondence.

H.R. REP. NO. 99-647, pt. 4, at 8 (1986).

10. Pratt & Whitney, NLRB Gen. Couns. Adv. Mem. Cases 12-CA-18446, 12-CA-18722, 12-CA-18745, 12-CA-18863 (Feb. 23, 1998). 1998 WL 1112978.

advent of new technologies in the workplace.

Part I of this Comment explores the leading case law that laid the groundwork for the Board and courts to analyze employee communication issues. Part II discusses a recent line of Board decisions and a trio of directives by the GC regarding e-mail communication issues. Finally, in Part III, the GC's analysis will be scrutinized to determine if its conclusions are valid.

I. TRADITIONAL ANALYSIS OF EMPLOYEE ORGANIZATION AND WORKPLACE COMMUNICATION

A former chairman of the NLRB once observed that "[o]ne of the major problems a union is confronted with in an organizational campaign is how to communicate with employees it seeks to organize."¹¹ The very proposition conjures up a ready-made conflict. For on the one hand, an employer has a tremendous investment in his plant and facilities and would prefer to oversee his property interests without interference from parties who have not contributed to the acquisition of such. On the other side of the equation stand employees' rights under the shield of the Wagner Act which guarantees workers the right to organize for the purpose of collective bargaining. On this point, the U.S. Supreme Court recognized that Section 7 organization rights are based on the ability of employees to learn the advantages and disadvantages of organization.¹² And, as a consequence, the High Court has long recognized that Section 7 rights are fulfilled when employees have the ability to effectively communicate with one another about unionization at work.¹³

Underpinning these lofty pronouncements is the Court's decision in *Republic Aviation v. NLRB*¹⁴ ("*Republic Aviation*"). In *Republic Aviation*, the Court had the opportunity to resolve the conflict between an employer's right to maintain discipline in the workplace and the employees' rights protected under Section 7 of the Act.

As a consequence of its prominence in labor law,¹⁵ a brief discourse on the facts of *Republic Aviation* will be instructive. Republic Aviation manufactured planes for the military at a plant

11. WILLIAM B. GOULD IV, A PRIMER ON AMERICAN LABOR LAW 64 (1993).

12. See *Cent. Hardware Co. v. NLRB*, 407 U.S. 539, 542-43 (1972).

13. See *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 491 (1978).

14. 324 U.S. 793 (1945).

15. *Republic Aviation* has been cited in 1339 cases according to the Westlaw databases. (visited Oct. 12, 2000) <[http://web2.westlaw.com/keycite/default.wl?cite=324 U%2ES%2E 793&newdoor=true&rs=LAWS%20E0&vr=1 %20E0](http://web2.westlaw.com/keycite/default.wl?cite=324%20U%2ES%2E%20793&newdoor=true&rs=LAWS%20E0&vr=1%20E0)>.

outside New York City during World War II.¹⁶ Prior to any union activity at its plant, the aviation manufacturer had adopted a rule prohibiting solicitation of any kind.¹⁷ Nonetheless, union organizers initiated a membership drive at the factory.¹⁸ Despite the plant rule, one worker, while on his lunch break, began passing out union membership cards to his fellow workers.¹⁹ Plant management fired the employee for violating the anti-solicitation rule.²⁰ In another instance, during the same organization campaign, three workers were fired for wearing union buttons at work after repeated management entreaties to remove the buttons.²¹ Company officials said the buttons amounted to a tacit recognition of that particular union when there was no such agreement.²²

The discharged employees sought relief with the filing of unfair labor practice ("ULP") charges against the airplane maker.²³ In rendering its decision, the Board disagreed with the employer that the wearing of union buttons was an implied recognition of a particular union.²⁴ The Board held that the manufacturer's no solicitation rule violated Section 8(1)²⁵ of the Act and the firings of

16. *Republic Aviation*, 324 U.S. at 794.

17. *Id.* The actual plant rule read, "Soliciting of any type cannot be permitted in the factory or offices." *Id.* at 795.

18. *Id.* at 795

19. *Id.*

20. *Id.*

21. *Republic Aviation*, 324 U.S. at 795.

22. *Id.*

23. *Id.* As stated previously, the heart of the Wagner Act is Section 7, which guarantees employees the right to form or join unions. *See supra* note 5. "To make this right effective, Congress outlawed employer practices that operated to deny workers the freedom to carry out the collective bargaining function. In short, Congress . . . was determined to prohibit any interference with the exercise of this right." BENJAMIN TAYLOR & FRED WITNEY, U.S. LABOR RELATIONS LAW 176-77 (1992). The Act specified five employer practices that would tend to interfere with employee exercise of Section 7 rights. It is an unfair labor practice for an employer: (1) to interfere with, restrain, or coerce employees in the exercise of their rights to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection. (2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it. (3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. (4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under the Act. (5) To refuse to bargain collectively with employee representatives. *See* 29 U.S.C. §§ 157-158 (1998).

24. *See Republic Aviation*, 324 U.S. at 795 (*citing Republic Aviation, Inc.*, 51 N.L.R.B. 1186, 1189 (1943)).

25. It is an unfair labor practice under Section 8(a)(1) for an employer: "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." 29 U.S.C. § 158(a)(1) (1998).

the workers violated Section 8(3) of the Act.²⁶ On appeal, the Second Circuit affirmed the Board's decision; Republic Aviation's petition for certiorari to the U.S. Supreme Court was granted.²⁷

The Court's primary mission in *Republic Aviation* was to balance the competing rights and interests of employers and employees. On this note, the Court recognized that each of these competing interests is valid:

Like so many others, these rights are not unlimited in the sense that they can be exercised without regard to any duty which the existence of rights in others may place upon employer or employee. Opportunity to organize and proper discipline are both essential elements in a balanced society.²⁸

The Court prefaced its analysis in *Republic Aviation* by observing that the Wagner Act's roomy language prohibits the imposition of a strict set of remedies.²⁹ The Act, the Court went on to say, serves as a statutory framework from within which the Board can accomplish its primary goal, i.e., to allow employees to join unions for their mutual aid and protection.³⁰ These are important observations for the Court to make, because they reject the notion that the Act requires a "one-size-fits-all" approach. Thus, the Court embraced the concept that the Act demands a tailored, fact-sensitive approach to cases arising under it.³¹ As will be

26. See *Republic Aviation*, 324 U.S. at 796. It is an unfair labor practice under Section 8(a)(3) for an employer to discriminate against an employee in regard to hire, discharge or any other condition of employment to promote or discourage union membership. 29 U.S.C. § 158(a)(3) (1998).

27. *Republic Aviation*, 324 U.S. at 796. The U.S. Supreme Court joined the Republic Aviation case with a similar case emanating from the 5th Circuit, *Le Tourneau Co. of Georgia*, 143 F.2d 67 (5th Cir. 1944). The facts of *Le Tourneau* are worthy of a brief explication. Two workers at the Georgia plant were fired after distributing union literature on company-owned property while on their own time. See *Republic Aviation*, 324 U.S. at 796-97. This was a violation of their employer's well-established and strictly enforced anti-distribution policy. *Id.* The rule read, "In the future, no Merchants, Concern, Company or Individual or Individuals will be permitted to distribute, post or otherwise circulate handbills or posters, or any literature of any description on Company property without first securing permission by the Personnel Department." *Id.* *Le Tourneau* promulgated the rule to curb litter and theft from employee automobiles. *Id.* The Board said the employee discharges for the union activity at *Le Tourneau* amounted to, as in *Republic Aviation*, violations of sections 8(a)(1) and 8(a)(3). *Id.* (citing *Le Tourneau*, 54 N.L.R.B. 1253 (1943)). The Supreme Court granted certiorari on account of the circuit split between the decisions in *Le Tourneau* and *Republic Aviation*. See *Republic Aviation*, 324 U.S. at 797.

28. See *Republic Aviation*, 324 U.S. at 798.

29. *Id.*

30. *Id.*

31. The Supreme Court enunciated a similar principle later when it stated "no such

evident later within this Comment, this is a crucial principle to remember in the application of *Republic Aviation* to contemporary questions concerning employee e-mail matters.

The *Republic Aviation* Court looked to several factors in balancing the competing interests of employees and employers in its resolution of the case: the rights guaranteed by Section 7, the time and place of the employee activity, an employer's property rights, and the employer's right to maintain discipline and order in the workplace. The Court endorsed the Board's findings in both the *Republic Aviation* and the *Le Tourneau* decisions. The Board had held that the company rules against solicitation were adverse to the employees' rights under the Wagner Act.³² In addition, in the underlying *Republic Aviation* decision, the Board held that the plant rules denied employees "their normal right to 'full freedom of association' in the plant."³³ The Board, and ultimately the Court, concluded that employee time at the workplace is the "uniquely appropriate" time and place for the exercise of Section 7 rights.³⁴

On the opposite side of the scale stands an employer's right to control his workplace and derive the benefits of having employees engaged in his operation. Here, the Court looked to the then-recent Board decision, *Peyton Packing Plant*,³⁵ for the now-famous proposition: "Working time is for work."³⁶ Employers are not barred under the Wagner Act from creating and enforcing reasonable rules for the purpose of controlling the discipline of the workforce while on company time.³⁷ The Court rejected *Republic Aviation*'s argument that the Act contravened an employer's property rights. "It is not every interference with property rights that is within the Fifth Amendment Inconvenience or even some dislocation of property rights, may be necessary in order to safeguard the right to collective bargaining."³⁸ Consequently, that an employer owns the property and can exercise the attending rights thereto is not

mechanical answers will avail for the solution of this non-mechanical, complex problem in labor-management relations." NLRB v. United Steelworkers, 357 U.S. 357, 364 (1958).

32. See *Republic Aviation*, 324 U.S. at 803.

33. *Id.* at 801 n.6.

34. *Id.* In a subsequent decision, the Board held that the work place is the one site where workers convene daily and regularly, and, while at work, they share common interests. As a consequence of this concentration of collective interest, the workplace is the traditional place for worker discussion about union organization. See *Gale Products*, 142 N.L.R.B. 1246, 1249 (1963).

35. 49 N.L.R.B. 828, 843 (1943).

36. See *Republic Aviation*, 324 U.S. at 803 n.10.

37. See *id.*

38. *Id.* at 802 n.8 (quoting *Le Tourneau*, 54 N.L.R.B. at 1260 (1944)).

dispositive of whether the employer can forbid the employees from engaging in activity safeguarded by the Act.³⁹ "Organization rights are granted to workers by the same authority, the National Government, that preserves the property rights. Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other."⁴⁰

Thus, to achieve the balance of Section 7 rights and an employer's property rights, the Board and the courts have said that employer rules banning union solicitation during working hours are consistent with the balance between these competing interests. However, such plant rules that prohibit employee solicitation on an employee's own time, even on company property, tip that balance away from the workers' statutory rights and, consequently, have been struck down.⁴¹ Solicitation, "being oral in nature, impinges upon the employer's interests only to the extent that it occurs on working time."⁴² Thus, the Court's ultimate holding in *Republic Aviation* and the lasting legacy of that decision is the presumption adopted from the Board decision in *Peyton Packing Company*.⁴³ Under this presumption, an employer can prohibit union solicitation during work hours, and such a rule must be presumed valid in the absence of evidence that it was adopted for discriminatory purposes.⁴⁴ Outside of working hours, such as lunch time, rest periods or breaks, an employee can use his or her time as he or she wishes, including engaging in Section 7-type activity without employer interference.⁴⁵

The legacy of *Republic Aviation*, that an employer may promulgate and enforce a rule prohibiting employees from engaging in solicitation during working hours, developed over the next several years following *Republic Aviation* with relatively few

39. In a later landmark decision, the U.S. Supreme Court held that an employer's property rights permit the exclusion of non-employee union organizers from company premises. See *NLRB v. Babcock & Wilcox*, 351 U.S. 105 (1956) (holding that an employer may restrict non-employee access to his premises, but must yield in the situation when employees would be beyond the reach of union organizers' reasonable efforts to communicate with them); see also *Lechmere v. NLRB*, 502 U.S. 527 (1992) (holding that non-employee union organizers have the right of access to employer's premises only when the workers are so inaccessible as to make ineffective organizers' reasonable efforts to reach them).

40. See *Babcock & Wilcox*, 351 U.S. at 112.

41. *Republic Aviation*, 324 U.S. at 802 n.8.

42. See *Stoddard-Quirk Mfg. Co.*, 138 N.L.R.B. 615, 619 (1962).

43. See *Republic Aviation*, 324 U.S. at 804.

44. *Id.* at 803 n.10.

45. *Id.*

problems.⁴⁶ Conversely, the law surrounding the distribution of literature at the workplace did not have such a smooth progression. Indeed, as the D.C. Circuit stated: "no-distribution rules have had a checkered history."⁴⁷ Ironically, the Board's decision in *Le Tourneau*, which was consolidated into the U.S. Supreme Court decision in *Republic Aviation*, dealt squarely with the issue of employees discharged for distributing literature in a plant parking lot.⁴⁸ There, the Board held that company rules centered on plant orderliness and productivity have a particular force inside of the building that does not carry out to areas beyond the production area.⁴⁹ Just as the Board struck a balance between employer-employee rights in *Republic Aviation* by distinguishing activities that are impermissible on "working time" from those that are allowed on "non-working time," the Board in *Le Tourneau* struck a similar balance regarding the extent of permissible distribution of literature on an employer's property.

One of the lasting standards emerging from *Stoddard-Quirk* is the Board's distinction between solicitation and distribution. The Board observed that solicitation and distribution are two distinct forms of communication requiring differing forms of analysis in reviewing plant rules concerning each.⁵⁰ Solicitation is oral in nature and intrudes on an employer's property interests when workers engage in such activity while working; recall *Peyton Packing's* "working time is for work."⁵¹ However, when viewed in light of the statutory right to engage in such activity, employees' rights would be completely meaningless if they could not exercise such rights at the place most appropriate for this kind of activity. Therefore, the Board, and later the Court, limited an employer's property rights, but only to the extent that solicitation occurs on non-working time.⁵²

Distribution of literature, however, presented a problem entirely

46. See *Stoddard-Quirk*, 138 N.L.R.B. at 617.

47. See *id.* at 618 (citing *United Steelworkers v. NLRB*, 243 F.2d 593, 597 (D.C. Cir. 1957)).

48. See *id.* at 619. For the text of the plant rule at issue in *Le Tourneau*, see note 27, *supra*.

49. See *Le Tourneau*, 54 N.L.R.B. at 1261.

50. See *Stoddard-Quirk*, 138 N.L.R.B. at 619. Unlike the dissent, the majority in *Stoddard-Quirk* refused to view regulations concerning solicitation *in pari materia* with those concerning distribution, noting that in no prior case before the Board or the courts was the issue of the distinction between the two dispositive to the resolution of the case. *Id.* at 619 n.5.

51. *Id.*

52. See *id.* at 620.

distinct from that of oral solicitation. Handbills and the like are dissimilar from speech, as they are tangible and are of a permanent nature. The Board held that, as a method of disseminating information, distribution succeeds so long as an employee receives the handbill or leaflet.⁵³ The attending problem with handbill distribution on company property is litter and the potential for production hazards resulting therefrom.⁵⁴ Litter in the workplace is a problem regardless of when employees receive handbills.⁵⁵ It followed that because an employer's interest in his shop is at its greatest in the production areas, the distribution of union literature might be prohibited in so-called working areas.⁵⁶ Outside of working areas, but still on employer premises, literature may be distributed to employees without employer interference. By setting such limitations on each party's rights, the substance of their respective interests is afforded appropriate weight.⁵⁷

The rule emerging from *Stoddard-Quirk* clarifies the parameters established earlier in *Republic Aviation*. Anti-solicitation rules are presumptively invalid if they apply to activity conducted during non-working time. Likewise, anti-distribution rules are presumptively invalid if they apply to distribution taking place in non-work areas of the plant.⁵⁸ The balance struck was in accord with the U.S. Supreme Court's ruling in *Babcock & Wilcox* that a "limitation on the employer's property right in each situation is imposed only to the extent that it is necessary for the maintenance of the employees' organizational right."⁵⁹

Again, as was the case in *Republic Aviation*, the Board and the Court recognized a fundamental mandate in solicitation/distribution cases. That is, the decisions of *Republic Aviation*, *Le Tourneau*, and *Stoddard-Quirk* establish an analytical framework for tailoring decisions based on particular facts within the solicitation/

53. See *id.* Distribution of union signature cards, however, is viewed as solicitation. See *id.* at 620 n.6.

54. See *Stoddard-Quirk*, 138 N.L.R.B. at 619.

55. *Id.*

56. Work areas are those where employees are engaged in productive activity. *Id.* See, e.g., *United Parcel Serv.*, 327 N.L.R.B. 65 (1998) (noting a number of Board decisions holding that a working area is where employees do the tasks assigned to them as part of their employment).

57. *Stoddard-Quirk*, 138 N.L.R.B. at 620-21.

58. *Id.* at 621.

59. See *id.* The presumption of invalidity of each of the anti-solicitation/distribution rules is overcome only with a showing that special circumstances require the rule in order to maintain production or discipline. *Id.* at 621-22. Moreover, the Board said that such a showing by an employer must not amount to mere assertions of such necessity. *Id.* at 622.

distribution arena.

The crucial considerations the Board and courts must pay heed to in striking the balance between an employer's property interests and employees' statutory rights are clear. First, an employee's time, even while on company premises, is his or her own, and he or she may engage in Section 7 activity during this time. Second, the employer's property interest in his or her plant is not entirely dispositive of the lawfulness of a given plant rule. Nonetheless, the employer's interests are at their greatest in the working areas of the plant; those rules prohibiting distribution in non-working areas are presumed invalid. But, an employer's concern for litter in the workplace is a legitimate one.⁶⁰ Third, a policy of accommodation of competing interests must prevail in Board decisions with regard to anti-solicitation/distribution rules.⁶¹ This last point is crucial to the analysis of e-mail communications in the workplace. As will be seen in the subsequent discussion of the Board's analysis of solicitation/distribution rules with regard to e-mail, no hard rules govern all situations.

II. E-MAIL IN THE WORKPLACE – RECENT BOARD PRONOUNCEMENTS

The Board has yet to address directly the issue of whether employee use of an employer's e-mail system comprises solicitation or distribution. In a recent decision the Board adopted an analogy which likened employer-owned e-mail systems to company phones or bulletin boards.⁶² In the underlying proceeding, the Administrative Law Judge ("ALJ") made this finding in dicta and, thus, the ALJ's characterization is of questionable precedential

60. See *United Parcel Serv.*, 327 N.L.R.B. at 2 (an "employer has a legitimate interest in keeping [work areas] free from litter."). Mere assertion of this as a means to defeat distribution campaigns, however, will not validate the rule. See *Stoddard-Quirk*, 138 N.L.R.B. at 621-22.

61. As the U.S. Supreme Court later stated: "[T]he locus of the accommodation between the legitimate interests of both may fall at differing points along the spectrum depending on the nature and strength of the respective § 7 rights and private property rights asserted in any given context." *Beth Israel Hosp.*, 437 U.S. at 504 (1978) (quoting *Hudgens v. NLRB*, 424 U.S. 507, 522 (1976)).

62. See *Adtranz, ABB Daimler-Benz Transp., N.A., Inc.*, 2000 WL 79735, at *6 (May 31, 2000). The analogy actually was the finding of the administrative law judge in this particular case. Under this scheme, an employee or union has no right to use an employer's phone or bulletin board. *Id.* (citing *Honeywell*, 262 N.L.R.B. 1402 (1982) (dealing with company bulletin boards) and *Union Carbide Corp.*, 259 N.L.R.B. 974 (1981) (no right to use employer telephone)). But once an employer allows employees to use these means of communication, it cannot restrict such usage in a discriminatory manner to prevent union access. *Id.*

value for future Board decisions.⁶³ Moreover, the ALJ's holding presents a shortsighted, but not uncommon, view⁶⁴ of e-mail as a form of communication. As will be discussed below, e-mail can be the most appropriate form of employee communication in certain situations. Therefore, it cannot be gainsaid that to eliminate this means of workplace communication would amount to a complete undoing of the tenets of *Republic Aviation* and its progeny.

The only other Board statement regarding company e-mail systems and union activity came in *E.I. DuPont Nemours & Co* ("*DuPont*").⁶⁵ In this case, the Board found that the chemical manufacturer had promulgated a rule explicitly prohibiting the use of its e-mail system for the dissemination of any union notices or literature.⁶⁶ The company maintained this rule despite the fact that it tolerated employees' use of its e-mail system to transmit sundry non-business items.⁶⁷ The Board agreed with the ALJ's underlying decision in *DuPont*, that the rule discriminated against unions, and, therefore, violated Section 8(a)(1) of the Act.⁶⁸ This case is unhelpful, however, in resolving the issue of whether e-mail

63. *Adtranz* involved a disputed representation election. Although the employer had a rule that employees could not use company computers for personal reasons, there was no evidence to suggest that the company e-mail system was used for union discussions. See *Adtranz*, 2000 WL 79735, at *6.

64. The bulletin board analogy garners much support in management quarters. See Daniel J. Roy, *Organizing: Legality of Employees' Use of E-mail for Union Organizing Debated at Forum*, 113 DAILY LAB. REP., June 12, 2000, at C-1.

65. 311 N.L.R.B. 893 (1993). The Board first discussed e-mail and Section 7 rights, albeit in a non-union context, in *Timekeeper Systems, Inc.*, 323 N.L.R.B. 244 (1997). In *Timekeeper Systems*, a computer programmer distributed a caustic critique of a management decision via e-mail to all company employees. After a series of negotiations between the disgruntled employee and his perturbed boss, the employee was fired for failing to give a written explanation of his acts. The employee brought an unfair labor practice charge against his former employer and prevailed. The Board found the employee's initial e-mail to be "concerted activity" that was within the protection of the Act. For a discussion of the Act's application to non-unionized white-collar workers and the *Timekeeping Systems* decision, see Deborah S.K. Jagoda and Jennifer M. Chow, *Nonunion Employees Have Traditional Labor Law Rights*, 5 EMP. L. STRATEGIST 1 (1997).

66. See *E.I. DuPont*, 311 N.L.R.B. at 919. Several employees involved in an organizational campaign at the chemical company were disciplined for transmitting union-related notices over the company's e-mail system. *NLRB Acting General Counsel Fred Feinstein's Report on Cases Decided from March 31, 1996 to June 30, 1998 (Full Text of Report)*, 172 DAILY LAB. REP., Sept. 4, 1998, at E-4.

67. See *E.I. DuPont*, 311 N.L.R.B. at 919.

68. "It shall be an unfair labor practice for an employer — (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7." 29 U.S.C. § 158(a)(1) (1998). The Board ordered the company to cease and desist from discriminatorily prohibiting employees from using the electronic mail system for distributing union literature or notices. See *E.I. DuPont*, 311 N.L.R.B. at 897-98.

constitutes solicitation or distribution, as the Board did not engage in this type of analysis in *DuPont*. What remains instructive on this issue, however, are a series of Advice Memoranda issued by the Advice Division of the NLRB's GC's office.⁶⁹ These directives, comprising the NLRB's first analytical sortie into e-mail as solicitation/distribution debate, are what practitioners are compelled to utilize as guidance in the absence of a plain statement by the Board.

A. A Trio of Advice Memoranda

Foremost among this series of advice memoranda is the *Pratt & Whitney* case.⁷⁰ Reflective of the type of tailored analysis required for solicitation/distribution cases, *Pratt & Whitney* is the standard for subsequent memoranda with regard to e-mail communication issues. Moreover, it represented a bold opportunity for the Board to construe the Act's protections by establishing a nexus between the Act's industrial heritage and today's high-tech workplace. The *Pratt & Whitney* directive illustrates the type of fact-sensitive inquiry required from reviewing bodies in analyzing employee workplace communication issues. Moreover, the directive assumes a prominent role in the analysis of subsequent advice memoranda. Therefore, it is not only useful but necessary to detail the facts of the *Pratt & Whitney* case. As a consequence of its influence, *Pratt & Whitney* ultimately provides guidance for labor organizers, employers, attorneys and the bench.

The nearly 2500 Pratt & Whitney employees, mostly aerospace engineers and their technical staff, design rocket engines at the firm's West Palm Beach, Florida, facility.⁷¹ The work of the engineers is very complex and requires extensive computer use. The importance of computers to Pratt & Whitney's operations cannot be overstated as the employer both allowed employees to connect their home computers to the company's network and, in

69. The NLRB instructed its field offices in early 2000 to forward all cases involving e-mail to the General Counsel's office. See Michael J. McCarthy, *Sympathetic Ear: Your Manager's Policy on Employee's E-mail May Have a Weak Spot*, WALL ST. J., April 25, 2000, at A1.

70. *Pratt & Whitney*, NLRB Gen. Couns. Adv. Mem. Cases 12-CA-18446, 12-CA-18722, 12-CA-18745, 12-CS-18863 (Feb. 23, 1998). 1998 WL 1112978. "[T]he General Counsel's view [in advice memoranda] does not have the force of law unless it is adopted by the Board." See Keith J. Rosenblatt, *Can Employers Prohibit Non-Business E-Mail?*, 8 METROPOLITAN CORP. COUNS., May 200, 18 (col. 1). Advice memoranda of the General Counsel are discussed in *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975).

71. See *Pratt & Whitney* at *1.

some instances, issued laptop computers to staff to allow them to remotely access its network.⁷² In 1995, several employees began a union organization drive at the rocket lab. Transmitting their organizational message by traditional methods of face-to-face communication or hand billing proved unfeasible, so the employee organizers resorted to the company's e-mail system.⁷³ This was a logical decision. After all, as testimony revealed, most or all of the employees used the company computers so extensively that e-mail was the primary means of communication between them.⁷⁴

Pratt & Whitney had enacted a policy prohibiting personal use of its computer systems, but the policy was not enforced strictly.⁷⁵ Pratt & Whitney management nonetheless imposed disciplinary measures on several employees for using company computers to propagate union-related e-mail messages and to download union material from the Internet.⁷⁶ The GC's analysis of the situation created by these facts was premised upon precedents governing traditional employee work place communication. Namely, the GC focused on the factors set forth in the line of decisions beginning with *Republic Aviation* and culminating in *Stoddard-Quirk*.⁷⁷ The succeeding sections of this Comment detail the application of those factors by the GC in *Pratt & Whitney*.

B. E-mail: Solicitation or Distribution?

Following *Stoddard-Quirk*, the distinction between solicitation and distribution must be made in light of the employee's statutory

72. *Id.* Approximately 10% of these employees were issued laptops. *Id.*

73. The organizers claimed to have sent about 10 mass e-mailings to the Pratt & Whitney engineers before management raised a flag with regard to such use of its e-mail system. See Noam S. Cohen, *Corporations Battling to Bar Use of E-mail for Unions*, N.Y. TIMES, August 23, 1999, at C1.

74. *Pratt & Whitney* at *1. One employee testified that he spent up to 80% of his work time on the computer. *Id.*

75. *Id.* For example, the company tolerated use of the e-mail system for the transmission of jokes, stories and other non-company related announcements.

76. One employee, an aerospace engineer, was suspended from his job for a month. See McCarthy, *supra* note 69. The disciplinary measures formed the basis of an unfair labor practice charge filed against the company.

77. *Stoddard-Quirk* serves well as a general guideline for these factors. Even though they are stated elsewhere in this Comment, I am providing them here as a reminder: Employer rules prohibiting solicitation during non-work time are presumed invalid in the absence of special circumstances; employer rules prohibiting distribution in non-work areas likewise are presumed invalid; property rights of an employer are not entirely dispositive of a rule's validity; moreover, in the arena of anti-solicitation/distribution rules, the Board and courts are compelled to strike a balance between employer property rights and the statutory right of employees to participate in union activity without employer interference.

rights to organize and the countervailing interest of an employer's property rights.⁷⁸ Recalling that the validity of employer anti-solicitation/distribution rules is measured in terms of their application to physical spaces on the employer's property,⁷⁹ the GC concluded in *Pratt & Whitney* that the computer terminals and company network comprised employees' "work area."⁸⁰ It could not have been otherwise as the employees demonstrably utilized computers to such an extent that the traditional conceptions of work areas, like the shop floor, are not applicable. In the "virtual office," there are no production lines with workers standing shoulder-to-shoulder, as computers and modem lines now form the connections between workers engaged in similar tasks often from different locations.

Notwithstanding the incompatibility of traditional notions of "work areas" with the facts at play in *Pratt & Whitney*, the GC concluded that the *Republic Aviation* and *Stoddard-Quirk* decisions maintain their validity in evaluating these issues. Thus, broad employer rules prohibiting solicitation activity during non-working times are presumptively invalid in the absence of special circumstances.⁸¹

The GC's determination that, in some instances, e-mail communication amounts to solicitation relied on a four-pronged base of support. First, the GC – in accord with *Stoddard-Quirk* – determined that if a particular communication may be reasonably expected to draw a spontaneous response or to start a conversation with the recipient, the communication is solicitation.⁸² Second, the GC embraced Congress' view that e-mail is "interactive in nature and can involve virtually instantaneous 'conversation.'"⁸³ Third, the GC cited a Florida appellate court decision supporting the proposition that e-mail is closely associated with solicitation.⁸⁴

78. *Stoddard-Quirk*, 615 N.L.R.B. at 617.

79. For example, anti-solicitation rules are presumptively invalid if they prevent workers from engaging in oral discussion about union matters on company premises during non-working time. Likewise, anti-distribution rules are presumptively invalid if they extend to non-work areas of the plant. See note 77, *supra*.

80. See *Pratt & Whitney*, 1998 WL 1112978, at *4.

81. See *id.* at *5. Special circumstances, taking the lead from *Republic Aviation*, remain an employer's concern for efficient production and/or plant discipline. *Id.*

82. See *id.*

83. *Id.* at *5 n.26, (citing H.R. REP. NO. 99-647, pt. 5, at 22 (1986)). This House Report concerned the Electronic Communication Privacy Act of 1986, 18 U.S.C. §§ 2510-2520 (1998).

84. *Id.* at *5 n.25 (citing *In re Amendments to Rule of Judicial Administration 2.051*, 651 So.2d 1185 (Fla. 1995)). The Florida High Court, in discussing public access to court records, stated that e-mail is more akin to spoken communications than telephone

Finally, the GC asserted that e-mail is often personal and individually targeted and, thus, is akin to individualized speech.⁸⁵

Even where e-mail is not focused on a particular person, the GC reasoned that, because e-mail affords the recipient the opportunity for spontaneous response, it is still more like oral communication than handbill distribution.⁸⁶ However, if the communication does not lend itself to such an exchange and its purpose is served simply upon receipt by the target, it is no different from a leaflet and, thus, amounts to distribution. The GC's contention is controversial, as it is premised on the characterization of "some" e-mail messages as solicitation.⁸⁷ The GC's distinction treads a fine line and leaves no clear-cut rule as to what e-mail amounts to solicitation and what e-mail is better characterized as distribution. The validity of the GC's decision in *Pratt & Whitney* will be discussed below.

C. Valid Concern over Litter

Recognizing that litter is a legitimate problem associated with the distribution of handbills and other printed materials, the Board in *Stoddard-Quirk* permitted employers to enforce plant rules prohibiting such distribution in work areas.⁸⁸ In the context of e-mail communication, the GC acknowledged that electronic communications pose similar problems with regard to company computer networks. Much as discarded handbills clutter an area and carry the potential of impeding workplace efficiency, "cyber litter" in the form of mass e-mail to large numbers of company employees likewise clutters and potentially hampers computer network efficiency. Because e-mail files occupy computer storage

conversations or printed media. See *In re Amendments*, 651 So.2d at 1186.

85. See *Pratt & Whitney*, 1998 WL 1112978, at *5.

86. *Id.*

87. Practitioners and commentators espousing a pro-management view of this issue have been critical of this aspect of the General Counsel's memorandum. See Allegra K. Williams, *Business-Only E-mail Policies in the Labor Organizing Context: It Is Time to Recognize Employee and Employer Rights*, 52 FED. COMM. L.J. 777, 785 (2000) (arguing that such a rule creates problems with respect to monitoring and, by extension, employee surveillance, a prohibited activity under the Act); Maureen W. Young, *Can Employers Limit Employee Use of Company E-mail Systems for Union Purposes?*, 72 N.Y. ST. B.J. 30, 34-35 (2000) (questioning General Counsel's analogy arguing that e-mail as solicitation imposes too great a burden on employer property interests); *NLRB Capable of Deciding Arising Issues, Panel Says*, 163 Lab. Rel. Rep. (BNA) 33 (Jan. 17, 2000), at D-19 (characterizing e-mail as distribution and raising surveillance issue).

88. See *Pratt & Whitney*, 1998 WL 1112978, at *6 (citing *Stoddard-Quirk*, 138 N.L.R.B. at 621).

space and thereby decrease network efficiency, a burdened computer network impedes the productivity of employees working on that network.⁸⁹ Furthermore, a wired employee may not necessarily wait until non-working time to read an e-mail message.⁹⁰

The GC was able to see past these matters in *Pratt & Whitney*, repeating the conclusion that, at least in some instances, e-mail is more akin to solicitation.⁹¹ The GC was cognizant of the fact that the incursion on an employer's property rights depends on the facts.⁹² Ultimately, the GC concluded that Pratt & Whitney's across-the-board ban on employee use of its e-mail system for non-business purposes was overly broad and, therefore, invalid.⁹³

The *Pratt & Whitney* directive became a lightning rod for criticism from practitioners and commentators in the absence of a Board ruling on this issue. And, in light of this deficiency, *Pratt & Whitney* also became the measuring stick for a pair of subsequent GC memoranda. These subsequent directives likewise examined company policies concerning employee use of company e-mail systems.⁹⁴ The rationale for the GC's decisions in each of these subsequent cases follows that set forth in the *Pratt & Whitney* memorandum. However, these two cases are distinguishable to the extent that, only in *TU Electric*, was an employee disciplined for using company e-mail for union-related messages.⁹⁵ The GC, after

89. See Williams, *supra* note 87, at 790-91.

90. See *Pratt & Whitney*, 1998 WL 1112978, at *6.

91. *Id.* The General Counsel rejected the contention that alternative means of communication were available to Pratt & Whitney employees, relying on the statement in *Republic Aviation* to the effect that such considerations are immaterial in the face of an overbroad ban on solicitation — like the one in effect at Pratt & Whitney.

92. A subsequent unionization vote failed at Pratt & Whitney. Following the issuance of the Advice Memoranda, Pratt & Whitney officials retooled their company's e-mail policy. Mirroring language contained within the Act, Pratt & Whitney now permits employees to use its e-mail system for discussing the "terms and conditions of employment and the employee's interest in self-organization." See McCarthy, *supra* note 59.

93. See *Pratt & Whitney*, 1998 WL 1112978, at *6.

94. See *TU Electric*, Gen. Couns. Adv. Mem. Case No. 16-CA-19810 (October 18, 1999) 1999 NLRB GCM LEXIS 19 (finding the company's no solicitation/distribution policy facially overbroad and, thus, violative of the Act) and *IRIS-USA*, Gen. Couns. Adv. Mem. Case 32-CA-17763 (February 2, 2000) 2000 WL 257107 (finding a company's policy not overbroad on its face).

95. See *TU Electric*, 1999 NLRB GCM LEXIS 19, at *4. The Company promulgated a rule in its employee handbook under the title "Company Assets." The plant rule restricted employee use of company equipment "for only legitimate business reasons on behalf of the Company." See *id.* at *2. Furthermore, under its "Computers and Software" policy, employee use of TU Electric's computer equipment was limited to business purposes only. See *id.* The Company's "No Solicitation/No Distribution" policy permitted employees to seek charitable

reviewing the *TU Electric* case, instructed the Regional Director to issue an 8(a)(1) and 8(a)(3) complaint against the employer.⁹⁶ The fact that the GC directed disciplinary measures against *TU Electric* makes it, like *Pratt & Whitney*, worthy of an explanation of its facts.

TU Electric is an electric utility located in Texas.⁹⁷ The TU Electric chemical engineers testified that, although daily e-mail use was limited to about an hour a day, computers played a prominent role in employee relations.⁹⁸ Despite the company rule on computer use, TU Electric apparently had tolerated e-mail use for reasons that both comported with and diverged from its no solicitation/distribution rule.⁹⁹ However, when an employee disseminated e-mail about an upcoming union election, management officials reproached him for violating the company's policies and ordered him to refrain from such activity.¹⁰⁰

The GC's Advice Division, upon receipt of the ULP charge against TU Electric, concluded that the company's anti-solicitation/distribution policy was both overly restrictive and only selectively enforced.¹⁰¹ As a matter of course, the GC reiterated the *Republic Aviation* and *Stoddard-Quirk* principles in assessing the validity of the utility's anti-solicitation/distribution policies. This type of analysis is routine, time-tested and beyond reproach. Broad strictures against employee communication and disparate enforcement have been routine subjects of Board decisions with results adhering to the principles announced in *Republic Aviation* and *Stoddard-Quirk*. Of particular note in *TU Electric*, however, is the GC's reliance on *Pratt & Whitney* for the proposition that a company's computer network may constitute the employees' "work

donations, to hand out literature related to such organizations with the permission of management and to use company bulletin boards to post certain items so long as these postings were not routine or for commercial purposes. *Id.* at *1.

96. *See id.* at *14-15. *See also* notes 25-26, *supra*, for an explanation of 8(a)(1) and 8(a)(3) violations.

97. *See id.* at *1.

98. *See id.* at *2-3. The employee subjected to discipline testified that employees used the computers and e-mail to communicate with one another and management daily; that company policy was transmitted via its computers; and that management routinely forwarded required reading to its employees via its e-mail system. *Id.* at *3.

99. *TU Electric*, 1999 NLRB GCM LEXIS 19, at *4. Testimony revealed that company e-mail was used for soliciting employees for charitable organizations, "limited" communication with spouses outside of work, and distribution of various personal announcements. *Id.*

100. *See id.* at *3-4.

101. *See id.* at *12-13.

area” for the purposes of a *Republic Aviation/Stoddard-Quirk* analysis.¹⁰² The GC concluded that, although the TU Electric employees did less work on their computers than the Pratt & Whitney engineers, the TU Electric network amounted to their “work area.”¹⁰³

The *TU Electric* “work area” finding was the basis for the GC’s decision to uphold the validity of an employer’s e-mail policy in the more recent *IRIS-USA* advice directive.¹⁰⁴ In *IRIS-USA*, the employer’s policy limited employee use of its system to company-only purposes.¹⁰⁵ The GC declined to make a decision on the validity of the rule based on the absence of facts indicating that *IRIS-USA*’s computers qualified as the “work area” of its employees.¹⁰⁶ “In sharp contrast” to *TU Electric*, *IRIS-USA* employees had very limited access to company-owned computers as they were engaged in manufacturing and distribution activities.¹⁰⁷ The absence of this predicate finding thus precluded the GC from engaging in further analysis under the rules of *Republic Aviation* and *Stoddard-Quirk*.

III. ASSESSING THE GC’S ANALYSIS IN THE MEMORANDA

In the wake of the trio of advice memoranda, it becomes readily apparent that technology could force a shift in thinking for the Board in the analysis of solicitation/distribution issues. This is already apparent in the re-definition of work area. This evolution will continue to manifest itself in other aspects of labor law as well. Prior to the emergence of e-mail as a means for employees to communicate at the workplace, *Republic Aviation*, *Stoddard-Quirk* and their progeny supplied the necessary rationale to resolve such cases. However, the ubiquity of computers in the workplace and

102. *Id.* at *10-11.

103. *See id.* at *11. “Although chemistry technicians use other computer systems for their substantive scientific duties, it is clear that the e-mail system comprises a significant aspect of their productive work life, and thus constitutes a ‘work area’ under *Republic Aviation*, if not the employees’ sole work area.” *Id.*

104. *See IRIS-USA*, 2000 WL 257107, at *3.

105. *See id.* at *3. The policy stated: “Employees are expected to use the voicemail, electronic mail and computer systems for company business only and not for personal purposes. Personal purposes include, but are not limited to, soliciting or proselytizing for commercial ventures, religious or political causes, outside organizations or other non-job-related solicitations.” *Id.* The General Counsel reiterated the *Pratt & Whitney* rule that broad bans against all non-business use of e-mail, including messages within the ambit of Section 7, are facially invalid. *Id.*

106. *See id.*

107. *Id.*

the resulting development of employee e-mail communication demand a re-evaluation of the rules by which solicitation/distribution cases are resolved. The GC's position on this point in *Pratt & Whitney* is largely unassailable because it follows the mandates of *Republic Aviation* and *Stoddard-Quirk*.¹⁰⁸ However, the GC's analysis has been subject to criticism on at least four fronts. Those criticisms are described and addressed forthwith.

Particularly frequent reproach has been leveled at the GC's characterization of e-mail as solicitation.¹⁰⁹ This criticism falls short in several regards. First, following the rationale of *Stoddard-Quirk*, solicitation is communication that may prompt a response. To baldly assert that an e-mail message concerning such things as one's working conditions or wages would not engender a response from the recipient ignores the realities of technology. Electronic mail functions in a way that permits users to instantaneously send and respond to messages. Thus, a conservative approach to this fact alone brings e-mail within the solicitation framework of *Stoddard-Quirk*.

Moreover, this type of criticism fails to afford the Board its place in the oversight of labor relations. The U.S. Supreme Court has expressed the view that the Board has the responsibility of "applying the Act's general prohibitory language in the light of the infinite combination of events that might be charged as violative of its terms."¹¹⁰ Therefore, unthinking assertions of what is, and what is not, solicitation contravenes the policy and purpose of the Act. In *Pratt & Whitney* and in other instances, the GC has specifically qualified the characterization of e-mail as solicitation. So far, this characterization has been dispositive in only two instances, in *Pratt & Whitney* and in *TU Electric*. In each of these instances, the GC has engaged in the type of balancing that precedent in this area demands. Therefore, the e-mail as solicitation determination by the GC was not without support and, thus, is worthy of serious consideration by the Board in future decisions.

The criticism that e-mail may be tailored to engender a response, thus likening it to oral solicitation, has merit, although it is somewhat dubious. Under this type of thinking, an employee union

108. *But see* Cohen, *supra* note 73 (objecting to the GC's use of industrial age precedent to resolve disputes centered in new technologies).

109. *See* Rosenblatt, *supra* note 70 (asserting that any e-mail can be tailored to prompt a response from its recipient). *See also* Young, *supra* note 87, at 35 (asserting that the GC's determination minimizes displacement of employer property interests).

110. *NLRB v. Stowe Spinning Co.*, 336 U.S. 226, 231 (1948).

advocate may send an e-mail notice to other employees with the requirement that the recipient return it to the sender to show receipt of the message. Thus, the bilateral exchange envisioned under the *Stoddard-Quirk* analysis is accomplished. The criticism of this "false response" only goes so far, however, when one considers that traditional non-wired notions of permissible employee exchange include situations where a union organizer tells his coworker of a union event during their break time, and the recipient coworker simply nods his head in acknowledgment of this communication. To suggest that mere acknowledgment of receipt of e-mail would be enough to preclude certain e-mail from consideration as solicitation is to engage in sophistry.

A more genuine issue raised by the characterization of e-mail as solicitation is that such activity may not occur exclusively during non-work time. There is no guarantee, in the absence of employer surveillance, that a message sent by employees during non-working hours will be read during non-working time. Currently, federal law prohibits the interception of electronic mail, but some exceptions permit employers to engage in such surveillance to monitor employee e-mail.¹¹¹ A consideration to be mindful of as well, and one beyond the scope of this Comment, is the illegality of employer surveillance of employee union organization activity.¹¹² But it appears that in the workplace context, employees have no privacy rights when it comes to their e-mail sent on company systems.¹¹³

The so-called "cyber litter" argument presents yet another area ripe for criticizing the GC's rationale in *Pratt & Whitney*. Because e-mail received on an employer's system consumes computer storage space, it has the potential to impede the efficiency of company computer systems.¹¹⁴ The cyber clutter determination was

111. See 18 U.S.C. § 2511 (1998).

112. The Board prohibits an employer from even giving the impression of surveillance under § 8(a)(1). "Employees should be free to participate in union organizing campaigns without the fear that members of management are peering over their shoulders, taking note of who is involved in union activities, and in what particular ways." *Flexsteel Indus.*, 311 N.L.R.B. 257 (1993).

113. *Debate Over Employer E-mail Policies Is Complicated by NLRB Decision That Messages Were Protected by LMRA*, 155 Lab. Rel. Rep. (BNA) 257, June 30, 1997, at D19. See also *Smyth v. Pillsbury*, 914 F. Supp. 97, 101 (E.D. Pa. 1996) (upholding dismissal of at-will employee who transmitted "unprofessional comments" via company e-mail system).

114. Frank C. Morris, Jr., *Issues from the Electronic Workplace. E-mail Communications: The Developing Employment Law Nightmare*, ALI-ABA 344 (July 25, 1996) (stating that e-mail impinges on an employer's property interest to the extent that it deprives the employer of an employee's work time when messages are read, and it drains employer resources by creating a computer system that handles a large influx of e-mail).

addressed in *Pratt & Whitney*, but it was not dispositive to the resolution of the case. The cyber clutter issue is closely related to the most glaring oversight in the GC's directive in *Pratt & Whitney*. That is, the GC failed to address in *Pratt & Whitney* whether there was an e-mail equivalent of distribution.¹¹⁵ This is a significant mistake. The Board in *Stoddard-Quirk* said that employee communications of a lasting, more permanent quality qualified as distribution.¹¹⁶ Thus, employers can ban the dissemination of such items in the work area. Certainly, e-mail falls into this category, as the recipient can read and re-read an e-mail after its initial receipt. Moreover, like handbills, e-mail can litter the computerized "work place" and impede network efficiency. The cyber clutter issue is a valid criticism but, like the other criticisms discussed herein, it has its shortcomings.

It cannot be gainsaid that an employer's property interest in his facilities is at its greatest in the production areas. Sources of interference with that interest may be prohibited to preserve and protect the employer's interest. It is clear under traditional modes of analysis that if so-called cyber clutter – in the form of a deluge of union-related e-mail messages – impedes worker efficiency, precedent establishes an employer's right to prohibit this type of activity in the work area.

Perfunctory analysis of these issues disregards the importance of the balancing process the Board and courts must engage in to resolve employee workplace communication issues. Precedent in this area, time and time again, demonstrates the necessity of engaging in a balancing of competing interests to resolve these types of matters. Moreover, mechanical rules will not suffice, and, thus, each situation must be addressed on its own particular circumstances. There is no apparent reason to divert from this course of action in the face of technology's advance into the workplace.

CONCLUSION

In both *Pratt & Whitney* and *TU Electric*, the GC determined that the employees performed a sufficient amount of their work on

messages).

115. *Pratt & Whitney*, 1998 WL 1112978, at *6. The employer's broad ban on employee use of its e-mail system for non-business purposes precluded the General Counsel from this analysis. *Id.*

116. See *Stoddard-Quirk*, 138 N.L.R.B. at 621-22 (1962).

computers such that the computer networks "in a very real sense" constituted those employees' work area. Assuming *arguendo* that the facts of a given case necessitate a finding that a computer network "in a very real sense" makes up the employees' work area, the employer could prevail through a showing that the union e-mail entering the work area has wrought a particular hazard to employee efficiency. However, this showing must be made through a particularized demonstration of the facts. This could include, but is not limited to, a showing of the company's overall computer storage space, the amount of such space dedicated to e-mail storage, the effect of employee e-mail use on overall productivity, and the effect on network efficiency from union-related e-mail traffic. Broad assertions of the need to control litter, in the absence of objective proof, will not justify a limitation on employees' distribution rights.¹¹⁷ This is consistent with the Board's long-standing policy favoring flexible decision-making.

An employer's property interest may have to yield in some instances but only to the extent that is necessary to preserve employees' Section 7 rights. Flexibility is necessary in the equation because standards that apply to the largest of corporations operating in one sector of the economy should not apply to the smallest, operating in a totally different sector.¹¹⁸ Rigidity simply contradicts the purpose and policy of the Act.

One question, however, remains: should an employer be able to prohibit use of its e-mail system as a consequence of the distribution-like qualities of e-mail? The facile answer, of course, is yes. At least one commentator has argued that *Stoddard-Quirk* demands such a conclusion.¹¹⁹ However, e-mail clearly bears the indicia of solicitation as well. A conundrum, therefore, exists because e-mail occupies both sides of the solicitation/distribution divide. The resolution of disputes arising from the two-faced nature of e-mail will require some not so new thinking by the Board. Like so many decisions by the Board and courts in the past on this issue, the answer to the problem lies in striking an appropriate balance between the competing interests at stake. The Board and courts must refrain from the mechanical application of *Republic Aviation* and *Stoddard-Quirk* by merely using those decisions as

117. *Id.*

118. Frank C. Morris, Jr., points to Kodak, where employees post more than 2 million e-mail messages a day via its e-mail system, as support for a tightening of restrictions on union access to company e-mail systems. Morris, *supra* note 114.

119. *Id.*

guidelines. In addition, the Board must stay faithful to the proposition that property rights of employers may have to yield to effectuate employees' Section 7 rights.

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